STATE OF MICHIGAN

COURT OF APPEALS

QUALITY PRODUCTS AND CONCEPTS COMPANY, Plaintiff-Appellant, v NAGEL PRECISION, INC., Defendant-Appellee.	UNPUBLISHED April 24, 2001 No. 207538 Wayne Circuit Court LC No. 96-612160 CK ON REMAND

Before: White, P.J., and Hood and Jansen, JJ.

PER CURIAM.

This contract dispute is before us for the second time, on remand from the Supreme Court. Our original opinion reversed the circuit court to the extent it dismissed claims based on waiver and a contract implied in law, on the basis that genuine issues of fact remained on these claims. *Quality Products and Concepts Co v Nagel Precision, Inc,* unpublished opinion per curiam (Docket No. 207538, issued 3/21/2000). In lieu of granting leave to appeal, the Supreme Court by order dated December 15, 2000, vacated the portion of our opinion holding that there were genuine issues of fact on the contract implied in law claim, and remanded for "reconsideration of the issue whether there exists a genuine fact dispute as to whether defendant's alleged silence in the face of plaintiff's activity relative to the excluded machine tool suppliers constituted a waiver in light of the anti-waiver provision in the contract which purports to prevent modification of the written agreement."[1] 463 Mich 934-935; 622 NW2d 788 (2000). We conclude that genuine issues of fact remained on the question of waiver and again reverse the circuit court's grant of summary disposition to defendant.

I

Pertinent facts as set forth in our initial opinion are:

[1] We assume that the anti-waiver provision referred to in the Supreme Court's order of remand is the provision of the agreement that states: "This Agreement may not be modified in any way without the written consent of the parties."

Plaintiff corporation is a former sales representative of defendant corporation, a manufacturer of large industrial machinery. . . .

* * *

The facts viewed in a light most favorable to plaintiff are that the parties orally agreed in 1990 that plaintiff would provide sales representation for defendant and receive a commission on sales within its assigned area. On August 1, 1993, the parties entered into a written sales representative agreement, which stated that plaintiff "hereby accepts such appointment subject to the terms and conditions set forth herein and expressly acknowledges that its Territory is both limited and nonexclusive." . . . . The agreement excluded from plaintiff's territory "all House Accounts and: All Transmission plants and other machine tool suppliers (turn key operations)."

* * *

In 1994, with the knowledge of Rolf Bochsler, defendant's vice-president and chief operating officer,[2] Kenneth Barton, plaintiff's principal, began to work with Chrysler Corporation to procure business from Giddings & Lewis and Ex-Cell-O. Pursuant to the written agreement, plaintiff submitted written status reports to Bochsler in 1994 and the first few months of 1995. Plaintiff appended to its response to defendant's motion for summary disposition copies of several such reports that indicated that Ex-Cell-O and Giddings & Lewis had been quoted prices and/or were ordering parts from defendant. These reports included "P.O. Status Reports" in chart form, which were dated June 1, 1994, October 1, 1994, and December 1, 1994, and in which plaintiff listed Giddings & Lewis 3.3 and 3.9 liter machines, and stated pertinent to the Giddings & Lewis orders a commission percentage figure and expected commission of $63,000 for each machine. Plaintiff also submitted below purchase orders Giddings & Lewis sent directly to defendant dated from May 19, 1994 to December 5, 1994, all of which stated "confirming to Ken Barton," and specified delivery dates on the 3.3 liter machine of February 28, 1995 and of March 31, 1995 on the 3.9 liter machine.[3] Plaintiff also submitted below a copy of a handwritten note from Barton to Bochsler dated July 18, 1994, in which Barton stated that QPAC's accountant was requesting an updated commission report, and listed the orders plaintiff's records showed, which included Giddings & Lewis orders for one 3.3 liter and one 3.9 liter honing machine.

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[2] In support of its response to defendant's motion, plaintiff attached excerpts of deposition testimony of Rolf Bochsler, defendant's vice president and chief operating officer, in which Bochsler stated that between the effective date of the parties' written agreement, and the date he terminated the agreement, he was aware that plaintiff was calling on Giddings & Lewis and Ex-Cell-O, and that

during that time frame, he and Barton had a number of discussions regarding engine machines that Giddings & Lewis and Ex-Cell-O were going to build for Chrysler. Bochsler further testified at deposition that Barton periodically provided him with various documents concerning the status of orders, including "P.O. Status Reports," "Quotation Status Reports," and "R & D Status Reports." Bochsler claims that during this period he told Barton that commissions would not be paid on the Giddings & Lewis business. [. . .]

[3] The purchase orders and supplemental purchase orders were for a Nagel honing machine for the 3.9 liter Chrysler Corporation V-6 cylinder block, and honing machine for the 3.3 liter. Also attached to plaintiff's response to defendant's motion was a letter from Giddings & Lewis to defendant which stated "Attn: Ken Barton." Giddings & Lewis' letter also stated that it was placing the purchase order for the 3.9 liter honing machines on hold (P.O. FF02183). The Giddings & Lewis order for the 3.3 liter honing machine was the subject of supplemental purchase orders dated November 23 and December 5, 1994 (FF021814) which stated: "NOTE: 23 Nov 94 addition of $72,700.00 new total $2,031,920.00 due to the following changes. . . "

In early 1995, defendant proposed modifying the parties' written agreement. Barton testified at deposition that in February of that year Bochsler advised him for the first time[4] that defendant would not pay commissions on the Giddings & Lewis and Ex-Cell-O business. Bochsler testified at deposition that he tried to modify the parties' agreement in 1995 not because he was dissatisfied with plaintiff's services, but because plaintiff's workload was too large to handle. Barton then requested an accounting of orders for which he had allegedly earned a commission.

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[4] Bochsler asserts, however, that he consistently told Barton that he would not be paid commissions on the Giddings & Lewis and Ex-Cell-O business.

By letter dated March 8, 1995, Bochsler terminated plaintiff's contract effective June 6, 1995. Defendant provided plaintiff an accounting in October 1995, stating that no commission was due on the Giddings & Lewis business because it was a turnkey operation and a machine tool supplier, and excluded from plaintiff's territory under the written agreement.

* * *

Although the circuit court accepted "as true that defendant knew about plaintiff's efforts to procure sales with the machine tool suppliers and that defendant never objected to plaintiff's

efforts," the court granted defendant summary disposition nonetheless, concluding that there was "no evidence that defendant did anything to encourage or authorize plaintiff to seek sales outside of the express territory found in the written contract."

II

Our initial opinion, *Quality Products, supra,* slip op at 5, stated regarding the question of waiver:

> Regarding waiver, in *Klas v Hardware & Furniture Co,* 202 Mich 334, 339-340; 168 NW 425 (1918), the Supreme Court addressed the question whether the defendant had expressly or impliedly waived a condition in the parties' written contract providing that written permission was required to do extra work, and whether waiver was a question for the jury:
>
> > The law has been stated as follows:
> >
> > "Waiver is a matter of fact to be shown by the evidence. It may be shown by express declarations, or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage; **or it may be shown by a course of acts and conduct, and in some cases will be implied therefrom. It may also be shown by so neglecting and failing to act as to induce a belief that there is an intention or purpose to waive.** Proof of express words is not necessary, but the waiver may be shown by circumstances or by a course of acts and conduct which amounts to an estoppel." 40 Cyc. p. 267.
> >
> > "Waiver is a mixed question of law and fact. It is the duty of the court to charge and define the law applicable to waiver, but it is the province of the jury to say whether the facts of the particular case constitute waiver as defined by the court." 40 Cyc. p. 270.
> >
> > "A provision in the contract that all extra work shall be ordered by the architect in writing may be waived by the parties, the question whether there has been such a waiver usually being one of fact, depending on the facts and the circumstances of the particular case. **Thus such waiver may be implied where the order and the extra work are known to the owner,** or where the extra work is orally ordered by the owner or called for by the agent in the plans and specifications; or the owner by his conduct may be estopped from setting up such provision as a defense." 9 Corpus Juris, p. 846. [Emphasis added.]

See also, 17A Am Jur 2d, *supra,* § 656, stating in pertinent part:

> . . . . An implied waiver exists when there is either an unexpressed intention to waive, which may be clearly inferred from the circumstances, **or no such intention in fact to waive, but conduct which misleads one of the parties into a reasonable belief that a provision of the contract has been waived.** [Emphasis in original.]

III

This Court in *Klas, supra,* held that anti-waiver provisions in written contracts may themselves be waived. Additional authority to that effect may be found in *Minkus v Sarge*, 348 Mich 415; 83 NW2d 310 (1957), in which the parties' written construction contract provided that alterations could be made if ordered by the owner in writing. The trial court had determined following a bench trial that the defendant had waived the provision, and the Supreme Court agreed:

> It is further claimed that there was no waiver of this provision. With such contention we are unable to agree. **That the parties had the right to modify the original contract by parol is not open to question, the contract not being one required by statute to be in writing . . . .** [2]
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> In the instant case the proofs of plaintiffs indicated that the details of the work as it proceeded were matters of frequent conversation between plaintiff George C. Minkus, the defendant, and the architect. It further appears in evidence that defendant was on the premises regularly, and that he was fully aware of what plaintiffs were doing. Whether he held the architect out as having authority to bind him by agreements for extras need not be determined **for it is apparent that defendant's conduct was such to indicate both knowledge of what was being done and acquiescence on his part therein.** The record further suggests that counsel for defendant on the trial did not dispute that certain items of labor and material were extras, although it may be doubted if any admission as to the amount of recovery was made. Plaintiff George C. Minkus also testified that as to one of said alleged extras, the rebuilding of a pilaster, defendant verbally made the request, stating at the time that it would be an extra. Such statement, if made, is scarcely consistent with the claim that there was no waiver of the provision of the contract **with reference to requiring orders for extras to be in writing**. [*Minkus, supra* at 421-422. Emphasis added.]

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[2] Defendant in the instant case did not argue to the contrary; rather, defendant argued that plaintiff presented insufficient evidence of waiver or modification to survive the summary disposition motion.

See also Anno: *Effect of stipulation, in private building or construction contract, that alterations or extras must be ordered in writing*, 2 ALR3d 620, §§ 22[a], 22[c], pp 658-659, 660-661, including citation or discussions of *Klas* and *Minkus, supra*:

> § 22. Mere knowledge of alterations or extra work
>
> [a] Generally
>
> In a number of cases it has been held that the contractor was entitled to recover for alterations or extras notwithstanding noncompliance with a stipulation requiring a written order, where it appeared that the work was performed with the knowledge of the owner, who made no objection to it. [citing cases including *Klas, supra*.]
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> * * *
>
> [c] Where knowledge is shown in conjunction with other circumstances tending to establish avoidance
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> In a number of cases a recovery for alterations or extras has been held sustainable notwithstanding noncompliance with a stipulation requiring a written order, where it appeared that the work was performed with the knowledge of the owner (or the general contractor in case of a subcontract), without any objection on his part, and other circumstances also tended to show the owner's intention to waive, modify, or otherwise derogate the stipulation.
>
> [Discussing cases including *Minkus, supra*, about which it noted:]
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> The finding of a waiver of the provision requiring the written order of the owner for extra work was upheld in *Minkus* [*supra*], where the record showed that the details of the work as it proceeded were matters of frequent conversation between the contractor and the owner; that the owner was on the premises regularly, and was fully aware of what the contractor was doing; that at the trial counsel for the owner did not dispute that certain items of labor and material were extras; and that as to one of the alleged extras, the owner verbally made the request, stating at the time that it would be an extra. The court said that the statement of the owner that a certain item requested by him would be an extra was inconsistent with the claim that there was no waiver of the provision requiring written orders for extras.

See also *Formall, Inc v Community Nat'l Bank of Pontiac*, 138 Mich App 588, 601-603; 360 NW2d 902 (1984) (holding that anti-waiver clause in revolving credit note may itself be subject to waiver as result of acts of parties, although limiting holding to facts presented); and *Cascade Electric Co v Rice*, 70 Mich App 420, 424; 245 NW2d 774 (1976) (noting that provision in construction contract requiring that no alterations be made except on owner's written order could be waived by person benefited by such provision, citing *Klas, supra*.)

We again conclude that plaintiff presented evidence sufficient to raise a genuine issue of material fact whether defendant's alleged silence in the face of Barton's activity in, and reporting

to defendant concerning, procuring turnkey business constituted a waiver of the provision requiring that modification to the parties' agreement be in writing. Plaintiff presented excerpts of Bochsler's deposition testimony in which Bochsler testified that between the effective date of the parties' written agreement and the date he terminated the agreement, he was aware that plaintiff was calling on Giddings & Lewis and Ex-Cell-O, that he and Barton had a number of discussions regarding engine machines that Giddings & Lewis and Ex-Cell-O were going to build for Chrysler, and that Barton periodically provided him with various documents concerning the status of orders. The documentary evidence plaintiff submitted below included written purchase orders submitted to defendant for business procured by Barton that stated "confirming to Ken Barton," and defendant did not dispute that plaintiff's ongoing written status reports set forth a commission percentage figure and sum plaintiff anticipated being paid for commission on the honing machine orders. Viewing the facts in a light most favorable to plaintiff, plaintiff presented evidence from which it could be inferred that defendant had knowledge of his efforts and procurement of turnkey business throughout at least the latter half of 1994 and into 1995, discussed with plaintiff the machines that these two turnkey suppliers were going to build for Chrysler, knew through receipt of various written reports from plaintiff that plaintiff expected to be paid a commission on this business, yet said nothing until February 1995 to indicate that plaintiff would not receive such a commission. From this conduct a reasonable fact finder could conclude that defendant's silence in the face of its knowledge that plaintiff had been calling on the two turnkey suppliers and that the turnkey suppliers' had placed orders through plaintiff constituted a waiver of the anti-waiver provision in the contract.

Reversed and remanded.

/s/ Helene N. White
/s/ Harold Hood
/s/ Kathleen Jansen